IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1289

GERALD MARKER, ET AL.,
Petitioners (Intervenors),

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Respondents (Plaintiffs),

and

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., ET AL.,
Respondents (Defendants).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR PLAINTIFF UNION RESPONDENTS

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COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether intervenors, who are suing plaintiff unions in various federal and state courts with funds and other assistance supplied by defendant Right to Work groups and who are represented in this very case by counsel working with and financed by those defendants, are entitled to intervention of right under

Rule 24(a) two-and-a-half years after suit was commenced.

2. Whether the limited permissive intervention granted intervenors by the District Court under Rule 24(b) was appropriate and, indeed, more than generous to intervenors, and whether the District Court's order granting limited permissive intervention was enforceable by striking intervenors' answer which admittedly went far beyond the limited intervention granted.

COUNTER-STATEMENT OF THE CASE

On May 1, 1973, a number of labor unions and their affiliates filed this suit against the National Right to Work Committee and the National Right to Work Foundation, two employer-financed groups dedicated to attacking union organization and union security. Plaintiff unions' complaint asserted that these two defendants are using employer money to encourage and finance suits by dissident employees and union members against plaintiff unions, in violation of the second proviso to Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4) (1970). That proviso bars "interested employers" from "directly or indirectly" financing or encouraging suits by union members against their unions. Plaintiffs seek an injunction and other relief against the continued instigation and financing by interested employers, through the defendant Committee and Foundation, of such suits by union members against their unions.

Upon the filing of this suit, defendants immediately moved to dismiss the complaint on a variety of grounds, including objections to the jurisdiction of the Court and a claim that the "interested employer" ban of the law applies only to the immediate employer of the

employee who is suing his union. On October 24, 1973, defendants' motion to dismiss was rejected by the District Court, 366 F. Supp. 46 (D.D.C. 1974), and discovery commenced immediately thereafter. On January 18, 1974, plaintiffs moved in the District Court for an order requiring defendants to reveal, under conditions of litigation confidence, the names of some 190 of the largest contributors among the more than 8000 employer contributors to the Foundation, and on June 5, 1974, the District Court directed defendants to furnish the names sought. Three separate efforts by defendants to obtain a review of that order in this Court were rebuffed.[1] Defendants still refused to comply with the District Court's discovery order and on January 26, 1976, that Court entered a Rule 37 order finding that "interested employers" are contributing to the Foundation's financing of suits by union members against their unions (App. 6a-7a). Having entered its Rule 37 order on the contributions of "interested employers", the District Court, *on its own initiative,* included in this same January 26th order a show cause order why summary judgment should not be entered for plaintiffs on this part of the case (*id.* at 8a). That show cause order is presently pending before the Dis-

[1] On June 27, 1974 defendants filed in the Court of Appeals an appeal and a petition for writ of mandamus to review the District Court's June 5, 1974 discovery order. On June 28, 1974 the Court of Appeals issued an order dismissing the appeal and this Court denied review thereof on January 20, 1975. 419 U.S. 1132. On March 17, 1975 the Court of Appeals issued its opinion dismissing the petition for writ of mandamus, and on April 14, 1975 this Court unanimously (Mr. Justice Douglas not participating) denied petitioners a stay. 421 U.S. 902-03. On June 16, 1975 this Court denied certiorari from the Court of Appeals' dismissal of the petition for writ of mandamus. 422 U.S. 1008. These impositions on the time of this Court were later conceded to be unwarranted by counsel for defendants (D.D.C. Tr. Oct. 9, 1975, at 7-8).

trict Court, along with plaintiff unions' motion for a preliminary injunction requiring the Foundation to place all employer contributions in escrow pending final decision. All briefs and memoranda have been filed below on both the summary judgment and preliminary injunction.

Meanwhile, in January of 1976, *more than two-and-a-half years after this suit was commenced,* Gerald Marker and 15 other persons filed a motion in the District Court to intervene as additional defendants. These intervenors (petitioners here) are the very plaintiffs suing their unions in actions supported by the defendant Committee and Foundation with "interested employer" contributions. The collusive character of the intervention attempt was further evidenced when the original defendants admitted that they are "financing the intervention",[2] that "the fees and expenses of counsel for the employee-intervenors will be paid by the Foundation,"[3] and that Godfrey P. Schmidt, counsel for intervenors, has been for many years a significant member of the team of lawyers working with defendants.[4]

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[2] Defendants' Response to the Motion and Request for Hearing, February 25, 1976, at 1.

[3] *Id.*

[4] Reed Larson, chief executive of both defendants, testified in deposition on February 9, 1976, that Schmidt is one of "a half dozen" or "maybe a dozen" outside counsel who handle most of defendants' cases; "[a]s outside counsel, he is one of the more active ones" (App. Below 309-10). Mr. Schmidt himself asserts that he has given defendants advice and counsel over the years (*id.* at 155-56). As Mr. Rex Reed, chief house counsel for defendant Foundation admitted on deposition, this advice and counsel extended to the instant motion to intervene, on which Messrs. Schmidt and Reed consulted "prior to the time that the intervention was filed" (*id.* at 314). It is noteworthy, too, that Mr. Schmidt conceded that "since 1973, he has been one of several local counsel and consultants retained by Defendant Foundation to consult to it" (*id.* at 155) and that, as such consultant, he prepared "a lengthy complaint and an extensive brief" concerning the agency shop clause and "participated in the ensuing intra-Foundation discussion and debate for several months" (id. at 156). Equally significant, Mr. Schmidt obtained the names of intervenors and their local counsel in their Foundation-financed suits from defendant Foundation and solicited their intervention in that manner (*id.* at 158).

On March 8, 1976, the District Court denied intervention of right on the ground that "movants are adequately represented" (App. 3a), but granted permissive intervention "on the limited issue of whether the plaintiffs in the lawsuits" financed by the Foundation "are union-members employees" (App. 3a-4a). On April 28, 1976, the District Court struck intervenors' answer because "outside the scope of the permissive intervention granted . . ." (App. 5a). On December 17, 1976, the Court of Appeals affirmed both District Court actions in a summary order (App. 2a). The petition for certiorari to review the unanimous actions below only compounds the previous unwarranted impositions on the time of this Court. See note 1, *supra.*

THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO SUBSTANTIAL QUESTION AS TO ANY OF THE CHALLENGED ACTIONS OF THE COURTS BELOW

(1) *The District Court was clearly correct when it held that "movants are adequately represented" by defendants.* What intervenors are seeking to protect is their alleged right to continue to maintain their suits against unions with the assistance of defendants and defendants' counsel who are financed by interested employers. Since defendants and their overlapping counsel are fighting for precisely that same right here, it is inconceivable that they would not be providing inter-

venors the best possible representation of those interests—if only to protect their own identical interests.[5] The right to support intervenors' suits with funds of interested employers and the right of intervenors to be supported in their suits with funds of interested employers are two sides of the same coin.

Intervenors try to obscure their identity of interest with defendants by the unsubstantiated assertion that "the interests of donees differ from those of donors of legal aid" (Pet. at 11). But the only relevant question here is the alleged common right of donees, donors, employees, the Right to Work Committee and the Foundation to "interested employer" financing of anti-union employee suits—not any additional rights these parties might possess in other unrelated situations. Quite simply, intervenors have no legal rights or interests in this suit which differ in any way from those of the defendants.

(2) Even if it were not immediately apparent from the circumstances of this suit that defendants and intervenors have no separable interest, the collusion of those two groups in initiating and processing this attempted intervention would suffice in and of itself to establish that point. *The defendants are financing the intervention, and a lawyer from their own team is the counsel for the intervenors.* The intervenors are not a new voice, but simply an addition to the chorus of defendants' lawyers. This collusion, in addition to demonstrating the absence of separable interest, is an independent basis for the denial of intervention. As then Judge

[5] Indeed, intervenors make no claim of the inadequacy of defendant's counsel, nor could they do so in view of the standing of Whitney North Seymour, Thomas S. Jackson, John Kilcullen, and Rex Reed, all counsel, along with their firms, for defendants in this case.

Blackmun wrote in 1960, "courts must be on guard against the improper use of the intervention process"; Rule 24 "is not to be taken advantage of where there is collusion . . ." *Kozak* v. *Wells,* 278 F.2d 104, 113 (8th Cir, 1960)

(3) The denial of intervention of right was also proper because intervenors failed to make "timely application" as required by Rule 24. *The effort at intervention came more than two-and-a-half years after the suit was commenced and just at the time when the matter assumed a posture for decision.* In *National Ass'n for Advancement of Colored People* v. *New York,* 413 U.S. 345 (1973), four months' delay in intervention was held untimely where, as here, intervenors "knew or should have known of the pendency of the . . . action" (at 366). Certainly, intervenors cannot claim ignorance of the pendency of this action, for not only were defendants intimately connected with the individual suits around the country, but intervenors' own chief counsel was working with the defendants throughout this period and had indeed attempted to file an *amicus* brief in the Court of Appeals in this very case as early as 1974.[6] Thus, untimeliness is added to adequate representation and collusion as a reason which supports the actions of both courts below in denying intervention of right.

(4) The limited permissive intervention granted intervenors by the District Court here under Rule 24(b)

[6] Mr. Schmidt, as counsel for the National Association of Orchestra Leaders, attempted to file a brief *amicus curiae* in this case before the Court of Appeals in support of the defendants' petition for mandamus. See note 1, *supra.* The July 8, 1974 Motion for Leave to File included this statement (at 3):

> "Movant did not request the consent of any party to this litigation, as permitted by Rule 29, F.R.A.P.; but movant believes that petitioners (Committee and Foundation) and their various attorneys will not oppose the instant application."

was, if anything, overly generous to intervenors—certainly the collusive nature of the intervention and its untimeliness were both grounds for denying permissive as well as intervention of right. The District Court, nevertheless, granted intervention limited to the "issue of whether plaintiffs in the lawsuits" financed by defendants were union members, and it was clearly entitled to enforce that limitation. *The intervenors have no more right to file an answer that goes beyond the District Court's limited intervention than they would have to file other papers in contravention of that intervention order or to seek to argue orally other points outside that permissive intervention.*[7]

(5) The intervenor-petitioners predicate a due process argument on the ground that "[t]he disabling permissive intervention allowed to Petitioners by the Courts below binds them under a possible judgment in this case." Pet. at 15. But where, as here, intervention has been specially limited, "only orders pertaining to the matter for which intervention was permitted would be binding on him [intervenor]." 3B *Moore's Federal Practice* ¶ 24.16[6], at 671 (1977). Furthermore, petitioners made no effort to withdraw their intervention

[7] There is no conflict between the instant case and *Stewart-Warner Corp.* v. *Westinghouse Electric Corporation*, 325 F. 2d 822 (2d Cir. 1963), *cert. denied* 376 U.S. 944 (1964). The *Stewart-Warner* Court, by a two to one vote, overruled the District Court's limitations on permissive intervention in order "to permit adjudication of all claims in one forum and in one suit . . ." (at 827); no such consideration is present here. Furthermore, the Second Circuit was obviously not barring all limited permissive intervention; in a more recent decision the Second Circuit stated that it saw "no reason" why a discretionary intervenor might not be subjected to conditions necessary to "efficient conduct of the proceedings." *Ionian Shipping Co.* v. *British Law Ins. Co.*, 426 F.2d 186, 191-192 (1970).

once they knew of the limitations placed by the Court thereon; instead they sought unilaterally to expand the limited role granted by the District Court in violation of the Court's order, and that was the one course not open to them. Finally, if a decision against the Right to Work defendants should, as a practical matter, prevent intervenors from receiving funds from the Right to Work defendants, intervenors still could have no complaint for their contention on this point would have been adequately represented by counsel for defendants (see pp. 5-6 *supra*). *In view of intervenors' point of view being adequately represented by defendants, as well as the collusive nature of intervenors' intervention and its untimeliness, the District Court was more than generous to intervenors in granting them even the limited permissive intervention provided in the District Court's order.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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